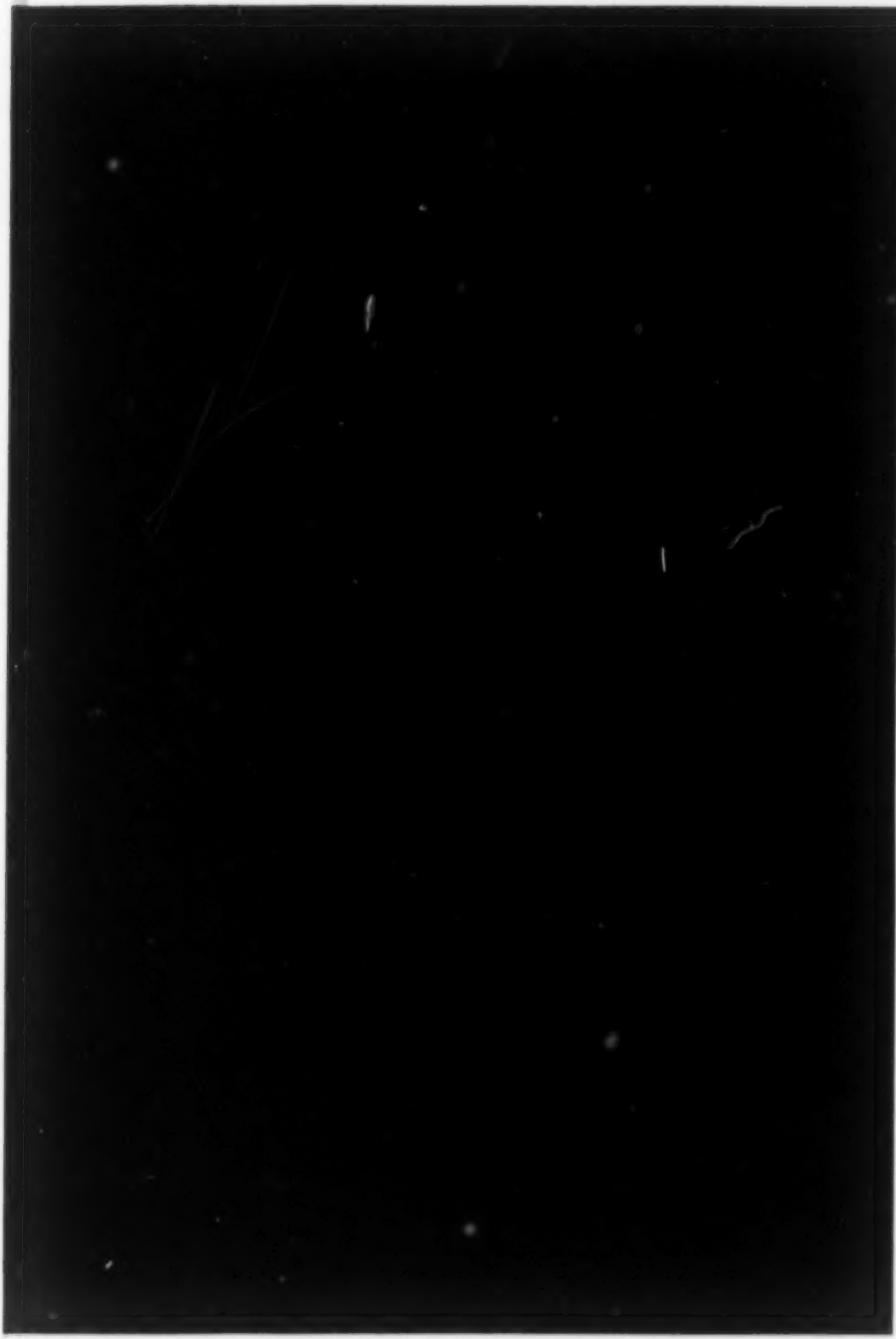

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

NO. 76-528

CONSUMERS POWER COMPANY, PETITIONER

v.

NELSON AESCHLIMAN, ET AL.

NO. 76-548

BALTIMORE GAS AND ELECTRIC CO., ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

NO. 76-745

LONG ISLAND LIGHTING COMPANY, PETITIONER

v.

THE LLOYD HARBOR STUDY GROUP, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

The United States and the United States Nuclear Regulatory Commission (the Commission)[1] file this joint brief to apprise the Court of their views on four related

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[1]The Nuclear Regulatory Commission has succeeded to the licensing and related regulatory functions of the Atomic Energy Commission in accordance with the Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1233, 42 U.S.C. (Supp. V) 5801 *et seq.*

petitions for writs of certiorari sought by affected parties from judgments entered July 21, 1976, and an order issued November 9, 1976, by the United States Court of Appeals for the District of Columbia Circuit. The federal respondents agree that the decisions of the court of appeals are in error; they disagree over whether the decisions contain any error of sufficient significance to warrant review by this Court. The Commission believes that the issue urged by petitioners regarding the procedures to be followed by the Commission upon a directed remand is appropriately presented, and consequently urges that the petitions sought in these proceedings be granted. The United States believes that this procedural issue is not appropriately presented in these cases; for that reason, and because the other questions presented do not independently have sufficient importance to warrant the exercise of this Court's jurisdiction, the United States believes the petitions should be denied.

QUESTIONS PRESENTED

1. Whether rulemaking proceedings governed by and fully complying with 5 U.S.C. 553 of the Administrative Procedure Act were nevertheless procedurally defective for failure to employ unspecified hybrid procedures to further "ventilate" the issues. (The Commission agrees with petitioners that this issue is properly presented in these cases; the United States disagrees.)

2. Whether the National Environmental Policy Act requires the reopening of an agency proceeding to assess new information bearing on "alternatives," where the alternatives were neither obviously central to the agency decision nor clearly identified as issues in the agency hearing.

3. Whether judicial relief is appropriate for the failure of the Commission's licensing board, *sua sponte*, to have returned the report of its Advisory Committee on Reactor Safeguards concerning the proposed Consumers Power nuclear plant for further clarification.

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STATEMENT

These cases arise out of the Nuclear Regulatory Commisson's method of considering certain anticipated environmental effects of the nuclear fuel cycle when it decides whether to issue construction permits and operating licenses for nuclear power reactors. The environmental effects are those from nuclear fuel reprocessing and waste management incidental to such reactors.[2] The essential facts can be briefly stated.

The Commission promulgated regulations assigning specific quantitative values to the environmental effects attributable to various operations associated with an individual reactor—including fuel reprocessing and waste management (10 C.F.R. 51.20(e)). It did so after making public an extensive environmental survey analyzing the whole of the fuel cycle, publishing a proposed rule, conducting oral hearings before an expert panel and entertaining written and oral argument before the Commission. The table of values ("Table S-3") promulgated as part of this rule was to be included in the environmental report required of each applicant for a license to construct or operate a nuclear power reactor, and in the Commission's environmental impact statement for each reactor license required by the National Environmental Policy Act of 1969 (NEPA) (83 Stat. 852, 42 U.S.C. 4321 *et seq.*) without being subject to further dispute. 10 C.F.R. 51.20(e), 51.21, 51.23(a), 51.26(a).

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[2] "Fuel reprocessing" refers to the treatment of spent fuel to recover fuel material for possible later use. "Waste management" concerns the handling and ultimate disposal of waste material resulting from operation of nuclear facilities. Other stages in the fuel cycle include mining, enrichment, fuel fabrication, reactor operation, and spent fuel storage.

In the first opinion ("*Vermont Yankee*"), which is the subject of the petitions in Nos. 76-419 and 76-548,[3] the court of appeals concluded that the rulemaking proceedings underlying the promulgation of these regulations were inadequate insofar as they concerned fuel reprocessing and waste management, and accordingly remanded both the Commission order granting an operating license for the Vermont Yankee nuclear power plant and the regulations at issue to the Commission for further consideration of the environmental effects of these aspects (Pet. No. 76-419, App. A-13, A-44).

In the opinion ("*Consumers Power*") that is the subject of the petition in No. 76-528, the court remanded the Commission's decision granting a permit to Consumers Power to construct two nuclear reactors (the Midland reactors)[4] citing its decision in *Vermont Yankee* as well as the Commission's failure to consider explicitly in its environmental impact statement whether energy conservation would obviate the need for the reactors (Pet. No. 76-528, App. 5-16). The Commission was directed to account for all intervening developments in its reanalysis of the energy conservation issue. With respect to another

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[3]The Vermont Yankee and Consumers Power proceedings were conducted before the promulgation of the contested regulation. The Commission decided in the Vermont Yankee licensing proceeding that environmental questions relating to fuel reprocessing and waste management should not be considered in individual licensing proceedings. That view was subsequently modified, and the challenged regulation was adopted to facilitate the consideration of such issues in subsequent proceedings (Pet. No. 76-419, App. A-3 to A-6). Because the incremental environmental effects so identified were insignificant, the Commission concluded that it was unnecessary to reopen decided cases (Pet. No. 76-528, App. 331-332, 335).

[4]The extensive agency consideration that preceded issuance of this permit is summarized in Pet. No. 76-528 at pp. 3-6.

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question—the clarity of the statutorily required reports of the Advisory Committee on Reactor Safeguards (ACRS) on the possible hazards of the proposed facility—the court faulted the Commission's hearing panel for having failed spontaneously to return the reports to the ACRS for amplification. The court directed that on remand the ACRS report on the Midland reactors should be returned "for clarification," the implication being that the Consumers Power hearings may then have to be reopened to take account of the clarified ACRS views (Pet. No. 76-528, App. 16-21).

Finally, in the decision that is the subject of the petition in No. 76-745, the court remanded the Commission's decision granting a permit to the Long Island Lighting Company to construct a nuclear power reactor to the Commission for further consideration of the environmental effects of fuel reprocessing and waste management. It relied without discussion on its decisions in *Vermont Yankee* and *Consumers Power* (Pet. No. 76-745, App. 1-2).

DISCUSSION

1. The federal respondents agree that the issue concerning the adequacy of the Commission's rulemaking procedures is the major issue presented by these petitions. However, the *Vermont Yankee* opinion, in which this issue is discussed, is subject to varying interpretations.

Petitioners and the Commission read the opinion as holding that the Commission's rulemaking proceeding, though in compliance with applicable statutory procedural requirements (5 U.S.C. 553; see 42 U.S.C. 2239(a)), was nevertheless procedurally defective. Aside from the court's insistence that additional procedures provide for "ventilation" of the issues and "dialogue" between the agency and interested parties, the opinion gives no guidance regarding the precise nature of the procedures to be

employed. Although the court also refers to asserted inadequacies of the record,[5] separate opinions by Judges Bazelon and Tamm underscore the majority's emphasis on asserted procedural deficiencies, leading the Commission to the reading also given by petitioner Vermont Yankee. The interpretation is one of which counsel advising federal agencies subject to judicial review under 28 U.S.C. 2342 and 2343 must take account. Under the decision, the Commission must be advised that in the remanded proceedings the use of procedures exceeding the minimum requirements of 5 U.S.C. 553 is no longer a matter of sound agency discretion but has become a matter of forced compliance with the vaguely articulated preference of the Court of Appeals for the District of Columbia Circuit.[6] So

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[5]Petitioners in No. 76-548 note as their second question for review the court's failure to offer any explanation for the conclusion that the rulemaking record on fuel reprocessing (as distinct from waste management) is inadequate. The federal respondents agree that whatever grounds the decision may fairly have identified for finding insufficient the record's 20-page statement on high-level waste management, they do not carry over to the reprocessing issue, on which the Commission had before it a 40-page section from the staff study (The Environmental Survey of the Nuclear Fuel Cycle), more than 25 pages of additional relevant testimony, and extensive comments on the environmental effects of reprocessing. See Pet. No. 76-548, p. 15, n. 14. Without explanation of its error or insufficiencies, the agency is left in confusion regarding the direction its action on remand should follow to prepare a record on fuel reprocessing that might survive subsequent judicial review. While this particular failure of the appellate function may not alone have an importance warranting Supreme Court intervention, it deserves correction, should the Court decide to review the decision below.

[6]The Commission has announced its intention to consider adoption of a rule for an interim eighteen-month period using notice-and-comment procedures, while an effort is made to develop a permanent rule using the more elaborate procedures the court of appeals has required. The proposed interim rule was published for public comment together with a related survey and impact analysis explaining the basis for the revised regulation, and the serious effects of a licensing moratorium. See Pet. No. 76-419, Supp. App. SA-5 to SA-24. The

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interpreted, the *Vermont Yankee* opinion conflicts sharply with applicable decisions of this Court holding that the notice-and-comment procedures of 5 U.S.C. 553 suffice to meet the "hearing" requirement. *See United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 241, and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758. See also Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1307 (1975). The opinion also conflicts with decisions in other circuits.[7] As has been demonstrated

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Commission believes that these notice-and-comment procedures satisfy Section 553. Moreover, even assuming the court of appeals correctly required more elaborate procedures for the promulgation of a permanent rule, the Commission believes the statutory notice-and-comment procedures are warranted for the interim rule by analogy to the emergency rulemaking provisions of 5 U.S.C. 553(a)(3)(B).

The Commission expects to decide shortly whether to adopt the proposed rule on an interim basis (*id.* at S-21, n. *). However, the Commission believes the APA entitles it to use such procedures, if it chooses, without need for special demonstrations, rules of limited duration, or subsequent use of more elaborate procedures.

[7] The Fifth, Ninth and Tenth Circuits, in disagreement with the D.C. Circuit, seem to deem notice-and-comment sufficient for informal rulemaking. See *General Telephone Company of Southwest* v. *United States*, 449 F. 2d 846, 862-863 (C.A. 5); *California Citizens Bank Association* v. *United States*, 375 F. 2d 43, 50 (C.A. 9), certiorari denied, 389 U.S. 844; and *Phillips Petroleum Company* v. *Federal Power Commission*, 475 F. 2d 842, 852 (C.A. 10), certiorari denied *sub nom. Chevron Oil Company* v. *Federal Power Commission*, 414 U.S. 1146. The Second and Fourth Circuits are aligned with the D.C. Circuit. See *Natural Resources Defense Council* v. *U.S. Nuclear Regulatory Commission* 539 F.2d 824 (C.A. 2), petition for certiorari pending on other issues *sub nom. Allied General Nuclear Services* v. *Natural Resources Defense Council*, No. 76-653; *Appalachian Power Company* v. *Environmental Protection Agency*, 477 F. 2d 495, 503 (C.A. 4). The First, Third, and Sixth Circuits seem ambivalent. *Law Motor Freight, Inc.* v. *Civil Aeronautics Board*, 364 F. 2d 139, 144 (C.A. 1); *Duquesne Light Company* v. *Environmental Protection Agency*, 481 F. 2d 1, 6-7 (C.A. 3); *Buckeye Power, Inc.* v. *Environmental Protection Agency*, 481 F. 2d 162, 170-172 (C.A. 6); *Upjohn Company* v. *Finch*, 422 F. 2d 944, 955 (C.A. 6).

quite recently, when Congress desires to require the use of hybrid rulemaking procedures it can do so specifically. See Section 6(c) of the Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2020-2023 (October 11, 1976).

The procedural question is of great significance to Commission functioning, since uncertainty concerning the ground rules of informal rulemaking will operate to "chill" the Commission's exercise of discretion in shaping procedures to provide the most effective rulemaking. In the Commission's view, the court's erroneous procedural discussion will give its mandate, once issued,[8] an effect of wrongful compulsion to conform Commission rulemaking procedures to unarticulated standards of the United States Court of Appeals for the District of Columbia Circuit, subject to the threat that licensing activities may be suspended for failure correctly to assess that court's intent. Especially where procedural error results in the setting aside of Commission action, the intrusion on agency procedural discretion exemplified by the *Vermont Yankee* opinion may well cause serious loss of the informal rulemaking flexibility intended by the Administrative Procedure Act and supported by this Court in *Florida East Coast Railway Co., supra*, 410 U.S. at 241. The Commission is entitled to be free of the coercive restraint on its lawful discretion which it perceives in the lower court's decision and which in its view

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[8]On October 8, 1976, the court of appeals stayed its mandate in the *Vermont Yankee* case indicating that the Commission could continue licensing activities "on condition that * * * any licenses granted between July 21, 1976 and such time when the mandate is issued [shall be] subject to the outcome of the proceedings herein." Pet. No. 76-419, Supp. App. SA-3 to SA-4. Pursuant to Fed. R. App. P. 41(b), the mandate now is stayed pending Supreme Court action on the petitions for certiorari. The Commission's interpretation of the stay of mandate has been sharply challenged in the court of appeals by the non-federal respondents.

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can only be relieved by Supreme Court review and modification of that decision. Review at a later point will not be sufficient, in the Commission's view, since in the interim the Commission will have been compelled to employ unnecessarily elaborate procedures, causing costly delay and perhaps an irreparable hiatus in development of an important national energy source. Thus the procedural issue identified by all petitioners clearly has both a legal and a practical significance warranting review.

The United States' disagreement with the Commission is in regard to whether this administrative law issue is presented in these cases. The United States believes that the court in *Vermont Yankee* held unanimously that the record in the particular rulemaking proceeding at issue was inadequate to support the rule promulgated. Pet. No. 76-419, App. A-25 to A-34, A-38 to A-41 and n. 60; A-51 to A-53 (concurring opinion). Judge Tamm's concurring opinion reflects his concern that "[t]he majority appears to require the Commission to institute further procedures of a more adversarial nature," although in Judge Tamm's view, "the deficiency is not with the *type* of proceeding below, but with the completeness of the record generated" (*id.* at A-52 to A-53). But, as Judge Tamm notes (*id.* at A-53, n. 4), the majority itself recognizes that "the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice" (*id.* at A-40).

The United States therefore believes that the most reasonable reading of the opinion below is that it remands the case to the Commission with directions to supplement the record, leaving the manner in which that is to be done to the agency's discretion. The discussion in the majority opinion (*id.* at A-40) concerning the many procedural devices available for further developing the record—specifically including the "more sensitive" use of the procedures previously used—is simply dicta, which at most

indicates the kind of agency review the court is likely to find adequate if the Commission's decision on remand is challenged in a later case. Based on this interpretation of the *Vermont Yankee* opinion as turning on the adequacy of the evidence in a particular rulemaking proceeding to support the agency's action, the United States submits that the decision presents no general administrative law question that warrants this Court's review.

In any event, the United States believes that review by this Court of the procedural issues submitted by petitioners would be premature. On remand, the Commission can supplement the record in whatever manner it deems appropriate. If the non-federal respondents challenge the new regulation, the court of appeals may then be required to decide specifically whether the agency procedures used on remand were adequate. If this Court is asked to review a decision on that ground, the procedural issue now presented by petitioners will be ripe for review. Cf. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 241; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758. In contrast, in the present posture of these cases, the procedural issue is not directly presented, since the court below found that the agency record was substantively inadequate. Under those circumstances, the only proper course was a remand for further proceedings. It would be no more appropriate for this Court than for the court of appeals to prescribe the methods and procedures to be used in the agency's supplemental inquiry. See *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333.[9]

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[9]The Commission, however, does not view the relief it is seeking as calling on this Court to prescribe the procedures to be used in the supplemental inquiry. As noted above, the relief it seeks is freedom from the cloud case on its discretion by the court of appeals' decision.

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2. The petitioner in No. 76-528 suggests that the court of appeals erred in holding that the Commission had inadequately considered energy conservation as an alternative to the proposed Midland nuclear facilities (Pet. No. 76-528, pp. 17-20). The court concluded that, since the agency bears the primary responsibility for evaluating the environmental impact of its proposed actions, the Commission's refusal to reopen the Midland construction permit hearing to consider "a colorable alternative" suggested by intervenors, but not previously evaluated, was arbitrary and capricious (Pet. No. 76-528, App. 12-14).

The Commission's view is that NEPA does not require the reopening of an agency proceeding to assess new information bearing on "alternatives," where the alternatives were neither obviously central to decision nor clearly identified as issues in the agency hearing at the outset. See 42 U.S.C. 4332(2)(C)(iii); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514. The Commission contends that the court of appeals' opinion, by focusing on present perspectives on the energy conservation question, demonstrates a disregard for the rule of reason that has been applied in reviewing the sufficiency of the consideration of alternatives contained in environmental impact statements. See, *e.g.*, *Natural Resources Defense Council* v. *Callaway*, 524 F. 2d 79, 92 (C.A. 2); *Life of the Land* v. *Brinegar*, 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961. The court's use of judicial hindsight renders exceedingly difficult the achievement of finality in what is necessarily an extremely drawn-out and complex licensing process. See *Interstate Commerce Commission* v. *Jersey City*, *supra*, 322 U.S. at 514-515. Accordingly, the Commission submits that this question merits review by this Court if it agrees to review the first question presented.

The United States does not believe that this question merits review by this Court at this time. There is no significant conflict in the circuits concerning the standard

for review of the contents of an NEPA statement. The Court below recognized (Pet. No. 76-528, App. 12) that an agency need not consider remote and speculative alternatives, and that the applicable test for reviewing the sufficiency of the alternatives considered in the NEPA statement is the rule of reason. Thus, even if the court incorrectly applied that test in concluding that the Commission should have explicitly considered energy conservation as an alternative to the construction of the Midland facilities, that error is not likely to have a substantial precedential effect, and further review by this Court is unnecessary to provide guidance for the lower federal courts in reviewing other NEPA statements.

3. Petitioner in No. 76-528 also suggests that the court below erred in finding that the Commission's licensing board should have returned, *sua sponte*, the report on the Midland construction permits of the Commission's Advisory Committee on Reactor Safeguards (ACRS) for revision to improve the report's specificity (Pet. No. 76-528, pp. 20-23).[10] The federal respondents agree that the court was wrong. It should not have reversed agency action years after the event because of the licensing board's failure to perceive on its own initiative a duty, not then established, to return the ACRS report that arguably did not sufficiently inform the public. Whether or not some elaboration in the ACRS report would have been useful, neither agency law

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[10]ACRS reports are not evidence in the licensing proceeding; rather they indicate that an expert committee has had the required opportunity to examine the proposed facility and advise the Commission of its safety concerns. The Midland report stated that the ACRS had concluded that "[o]ther problems related to large water reactors * * * identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports" would be resolved during construction. The court held that the licensing board should have asked the ACRS for a further explanation of these additional matters of concern and for cross-references to previous reports (Pet. No. 76-528, App. 17-21).

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nor any other principle then operative suggested the existence of a duty to seek this enlargement on request, much less *sua sponte*.

The Commission accordingly suggests that this question, too, merits review by this Court if it decides to review the first question presented. The United States does not believe that the issue is of sufficient significance to merit review by this Court, either alone or in connection with a decision to review other issues in these cases.

CONCLUSION

In the view of the Nuclear Regulatory Commission, the petitions should be granted. The United States believes that the petitions should be denied.

Respectfully submitted.

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